TSR Bina Sdn Bhd v Sykt Pembenaan Yeoh Tiong Lay Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(C)(A)-1352–07 OF 2021 AND W-02(C)(A)-1353–07 OF 2021

CHE MOHD RUZIMA, AHMAD ZAIDI IBRAHIM AND AZIZUL AZMI ADNAN JJCA

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Building and Construction Law — Adjudication — Construction Industry Payment and Adjudication Act 2012 ('CIPAA') — Whether adjudicator was master of his own procedure under CIPAA and was entitled to disallow party from filing further reply/rejoinder — Whether party so affected was not denied of natural justice as parties had, or could have, addressed so-called 'new issues' earlier in the proceedings — Whether adjudicator was entitled to find that materials before him were sufficient for him to make a decision — Whether grounds on which High Court could set aside adjudication decision ('AD') under s 15 CIPAA were limited — Whether High Court could not treat s 15 CIPAA application as an appeal and set aside AD on ground adjudicator's findings of fact or interpretation of the law were wrong

The respondent ('YTL') had subcontracted construction work to the appellant ('TSR'). Dissatisfied with TSR's performance, YTL terminated the subcontract. Although prior to the termination YTL had issued interim payment certificates certifying that TSR had completed work to the value of RM1,743,300, it did not pay the said amount. TSR initiated adjudication proceedings under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') to recover the said outstanding amount and also commenced arbitration proceedings to challenge, inter alia, the termination of the subcontract. Meanwhile, the adjudication proceedings concluded in an adjudication decision ('AD') under which YTL had to pay TSR an adjudicated sum of RM1,106,503.46 together with interest and costs. On YTL's failure to pay the adjudicated amount, TSR applied to the High Court ('HC') under s 28 of the CIPAA to enforce the AD. In response, YTL applied under s 15 CIPAA to set aside/stay the AD pending the disposal of the arbitration proceedings. The HC dismissed TSR's application and allowed YTL's application, resulting in the instant two appeals. The HC held that the AD had to be set aside for breach of natural justice because of the adjudicator's refusal to allow YTL to file a further reply/rejoinder to TSR's adjudication reply. YTL contended that TSR had raised 'new issues' in its adjudication reply and it was only fair that YTL was given an opportunity to reply thereto. The HC held that the issues were material and could have affected the AD. TSR argued that no breach of natural

justice had occurred because none of the issues raised by YTL were new as the parties had addressed them earlier in the proceedings. In any event, the adjudicator himself, in his letter to the parties, had stated that it was not necessary for YTL to file a further reply as all the materials and submissions that were before him were clear and sufficient for him to make an AD.

Held, allowing both appeals and setting aside the High Court's decisions:

(1) Section 12(1) of the CIPAA reinforced the general principle that the adjudicator was the master of his own procedure. Section 25 of the CIPAA provided a list of procedural matters that empowered the adjudicator to conduct the proceedings in an inquisitorial manner to ensure expeditious and effective adjudication proceedings. And, he had to comply within the timeframe of 45 days to deliver his decision as set out in s 12(2)(a) and (b) of the CIPAA. In line with the powers given to him by CIPAA, the adjudicator had the sole discretion whether or not to allow any further response/rejoinder after the adjudication reply had been filed although the exercise of such discretion would be subject to compliance with the rule of natural justice as required under s 24(c) of the CIPAA (see paras 35 & 37).

(2) On receiving YTL's application to file a further response to the adjudication reply, the adjudicator had considered the application, TSR's response thereto and all documents filed in the proceedings and the submissions that had been made before deciding to reject YTL's application on the ground that the parties had been fairly allowed to make their respective submissions and that the materials that were then before him were clear and sufficient for him to make an AD (see paras 42–43).

(3) The 'new issues' that YTL alleged were raised in TSR's adjudication reply related to matters of non-submission of the performance bond, delay in progress of the subcontract vis a vis the granting of extensions of time, the wrongful/unlawful termination of the subcontract by YTL and YTL's entitlement to LAD as a valid defence and set off to TSR's claim. Upon perusing the records of the adjudication proceedings, this court found that the so-called 'new issues' were not new at all but were in fact raised by YTL in its adjudication response and that what TSR did was to simply raise a reply to the response put by YTL. In fact, in its adjudication response, YTL had included more than 1,000 pages of supporting documents which were closely related to TSR's claim or YTL's defence and set off (see para 46).

(4) The adjudicator had fairly given YTL the opportunity to present its case and it could not be said that there had been a denial of natural justice even if TSR's adjudication reply referred to documents or raised submissions not particularly addressed in YTL's adjudication response. The

documents that were said to be 'new documents' were always in YTL's possession and if YTL chose not to address the issues as relevant to its defence and set off, it could not blame the adjudicator for its own shortcomings (see paras 47–48).

(5) Whether or not a further response/rejoinder should be permitted was purely a matter of a proper exercise of discretion by the adjudicator. Here, the adjudicator was satisfied that there were sufficient materials before him to deliberate and to decide. The exercise of discretion by the adjudicator was not unreasonable and it did not amount to a breach of natural justice. The adjudicator had acted within his power under the law to make the decision. In fact, as a master of his own procedure, the adjudicator was well entitled to do so under CIPAA (see para 48).

(6) A setting aside application under s 15 of the CIPAA was not an appeal. The High Court could not set aside an AD even if it was of the view that the adjudicator had erred on a finding of fact or on interpretation of the law. Even if there were valid grounds to set aside the AD on the merits, the aggrieved party should proceed to re-argue the dispute in court or in arbitration proceedings (see para 49).

(7) As the adjudicator had considered and made a decision largely on factual grounds, it was not for the High Court to decide whether the adjudicator had reached the correct conclusion on the facts or the law. In other words, whether or not the adjudicator had made a correct decision was purely a question of merits of the AD which was not amenable to be challenged in court under CIPAA (see para 50).

(8) By setting aside the AD, the High Court had meddled with the merits of the AD. The High Court's grounds of judgment clearly showed that the judge had discussed, deliberated and made findings on the merits of TSR's claim and YTL's defence and set off as if the matters were before her to decide. It seemed as if the High Court judge was hearing an appeal against the AD rather than a setting-aside application under s 15 of the CIPAA. The correct approach was, even if the result might have been different if the dispute had come before the High Court judge at first instance, the judge should not disturb the AD which was based upon factual and legal conclusions which the adjudicator was entitled to make under the law. The High Court judge had acted beyond her boundary when she decided to disturb the AD on findings of fact and law. Even if it could be said that the court would have arrived at a different decision than the adjudicator, this by itself was not a basis for setting aside the AD on the ground of breach of natural justice (see para 51).

(9) There was an overarching duty on the adjudicator to render the AD within a limited time frame. Section 12(2) of the CIPAA mandated that an AD had to be delivered within 45 days from the service of the

adjudication reply, failing which the AD was void. Constrained by the timeframe, the adjudicator should be given some leeway in deciding his route maps, including his discretion to finalise his own procedure for handling the dispute before him. The adjudicator's refusal to allow YTL to file a further rejoinder was well within the adjudicator's discretion and should not be a basis for setting aside the AD on the ground of breach of natural justice (see paras 52–53).

[Bahasa Malaysia summary

Responden ('YTL') telah mensubkontrakkan kerja pembinaan kepada perayu ('TSR'). Tidak berpuas hati dengan prestasi TSR, YTL telah menamatkan subkontrak tersebut. Walaupun sebelum penamatan YTL telah mengeluarkan sijil pembayaran interim yang memperakui bahawa TSR telah menyiapkan kerja dengan nilai RM1,743,300, ia tidak membayar jumlah tersebut. TSR memulakan prosiding adjudikasi di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP') untuk mendapatkan semula jumlah tertunggak tersebut dan juga memulakan prosiding timbang tara untuk mencabar, antara lain, penamatan subkontrak tersebut. Sementara itu, prosiding adjudikasi berakhir dengan keputusan adjudikasi ('KA') di mana YTL perlu membayar TSR sejumlah RM1,106,503.46 berserta faedah dan kos. Atas kegagalan YTL untuk membayar jumlah yang diadjudikasi, TSR memohon kepada Mahkamah Tinggi ('MT') di bawah s 28 CIPAA untuk menguatkuasakan KA. Sebagai balasan, YTL memohon di bawah s 15 CIPAA untuk mengetepikan/menggantung KA sementara menunggu pelupusan prosiding timbang tara. MT menolak permohonan TSR dan membenarkan permohonan YTL, menyebabkan dua rayuan segera. MT memutuskan bahawa KA perlu diketepikan kerana melanggar keadilan semula jadi kerana keengganan adjudikator untuk membenarkan YTL memfailkan jawapan lanjut/pencantuman kepada jawapan adjudikasi TSR. YTL berhujah bahawa TSR telah membangkitkan 'isu baharu' dalam jawapan adjudikasinya dan ia adalah adil jika YTL diberi peluang untuk menjawabnya. MT memutuskan bahawa isu itu adalah material dan boleh menjejaskan KA. TSR berhujah bahawa tiada pelanggaran keadilan semula jadi telah berlaku kerana tiada satu pun isu yang dibangkitkan oleh YTL adalah baru kerana pihak-pihak telah menanganinya sebelum prosiding. Dalam apa jua keadaan, adjudikator sendiri, dalam suratnya kepada pihak-pihak, telah menyatakan bahawa YTL tidak perlu memfailkan jawapan lanjut kerana semua bahan dan hujahan yang ada di hadapannya adalah jelas dan mencukupi untuknya membuat KA.

Diputuskan, membenarkan kedua-dua rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Seksyen 12(1) APAIP mengukuhkan prinsip am bahawa adjudikator adalah tuan bagi prosedurnya sendiri. Seksyen 25 APAIP menyediakan senarai perkara prosedur yang memberi kuasa kepada adjudikator untuk

menjalankan prosiding secara inquisitorial untuk memastikan prosiding adjudikasi yang cepat dan berkesan. Dan, dia perlu mematuhi dalam tempoh masa 45 hari untuk menyampaikan keputusannya seperti yang dinyatakan dalam s 12(2)(a) dan (b) APAIP. Selaras dengan kuasa yang diberikan kepadanya oleh APAIP, adjudikator mempunyai budi bicara mutlak sama ada membenarkan atau tidak sebarang jawapan lanjut/pencantuman selepas jawapan adjudikasi telah difailkan walaupun penggunaan budi bicara tersebut akan tertakluk kepada pematuhan peraturan keadilan semula jadi seperti yang dikehendaki di bawah s 24(c) APAIP (lihat perenggan 35 & 37).

(2) Apabila menerima permohonan YTL untuk memfailkan jawapan lanjut kepada jawapan adjudikasi, adjudikator telah mempertimbangkan permohonan itu, jawapan TSR terhadapnya dan semua dokumen yang difailkan dalam prosiding dan hujahan yang telah dibuat sebelum memutuskan untuk menolak permohonan YTL atas alasan bahawa pihak-pihak telah dibenarkan secara adil untuk membuat penghujahan masing-masing dan bahawa bahan-bahan yang ada sebelum itu adalah jelas dan mencukupi untuk dia membuat KA (lihat perenggan 42–43).

(3) 'Isu-isu baharu' yang didakwa YTL dibangkitkan dalam jawapan adjudikasi TSR berkaitan dengan perkara-perkara ketidakserahan bon pelaksanaan, kelewatan dalam proses subkontrak berbanding pemberian lanjutan masa, penamatan subkontrak yang salah/yang menyalahi undang-undang oleh YTL dan kelayakan YTL kepada LAD sebagai pembelaan yang sah dan penolakan kepada tuntutan TSR. Setelah meneliti rekod prosiding adjudikasi, Mahkamah ini mendapati bahawa apa yang dipanggil 'isu baharu' bukanlah perkara baru tetapi sebenarnya telah dibangkitkan oleh YTL dalam jawapan adjudikasinya dan apa yang dilakukan oleh TSR adalah dengan hanya membangkitkan jawapan kepada jawapan yang dikemukakan oleh YTL. Malah, dalam maklum balas adjudikasinya, YTL telah memasukkan lebih daripada 1,000 muka surat dokumen sokongan yang berkait rapat dengan tuntutan TSR atau pembelaan dan penolakan YTL (lihat perenggan 46).

(4) Adjudikator telah memberikan YTL peluang secara adil untuk membentangkan kesnya dan tidak boleh dikatakan bahawa telah berlaku penafian keadilan semula jadi walaupun jawapan adjudikasi TSR merujuk kepada dokumen atau mengemukakan hujahan yang tidak ditujukan secara khusus dalam respons adjudikasi YTL. Dokumen yang dikatakan sebagai 'dokumen baharu' sentiasa berada dalam simpanan YTL dan jika YTL memilih untuk tidak menangani isu yang berkaitan dengan pembelaan dan penolakan, ia tidak boleh menyalahkan adjudikator atas kelemahannya sendiri (lihat perenggan 47–48).

(5) Sama ada balasan lanjut/pencantuman dibenarkan atau tidak adalah semata-mata soal pelaksanaan budi bicara yang sewajarnya oleh

adjudikator. Di sini, adjudikator berpuas hati bahawa terdapat bahan yang mencukupi di hadapannya untuk diteliti dan membuat keputusan. Perlaksanaan budi bicara oleh adjudikator bukanlah sesuatu yang tidak munasabah dan ia tidak dianggap sebagai pelanggaran keadilan semula jadi. Adjudikator telah bertindak mengikut kuasanya di bawah undang-undang untuk membuat keputusan. Malah, sebagai ahli prosedurnya sendiri, adjudikator berhak untuk berbuat demikian di bawah APAIP (lihat perenggan 48).

(6) Permohonan mengenepikan di bawah s 15 APAIP bukanlah rayuan. Mahkamah Tinggi tidak boleh mengenepikan KA walaupun ia berpendapat bahawa adjudikator telah tersilap dalam dapatan fakta atau tafsiran undang-undang. Walaupun terdapat alasan yang sah untuk mengetepikan KA atas merit, pihak yang terkilan harus meneruskan untuk menghujahkan semula pertikaian di mahkamah atau dalam prosiding timbang tara (lihat perenggan 49).

(7) Memandangkan adjudikator telah mempertimbangkan dan membuat keputusan sebahagian besarnya atas alasan fakta, Mahkamah Tinggi tidak berhak memutuskan sama ada adjudikator telah mencapai kesimpulan yang betul mengenai fakta atau undang-undang. Dalam erti kata lain, sama ada adjudikator telah membuat keputusan yang betul atau tidak adalah semata-mata soal merit KA yang tidak boleh dicabar di mahkamah di bawah APAIP (lihat perenggan 50).

(8) Dengan mengetepikan KA, Mahkamah Tinggi telah campur tangan dengan merit KA. Alasan penghakiman Mahkamah Tinggi dengan jelas menunjukkan bahawa hakim telah membincangkan, meneliti dan membuat dapatan mengenai merit tuntutan TSR dan pembelaan YTL dan menolak seolah-olah perkara itu ada di hadapannya untuk diputuskan. Ia seolah-olah hakim Mahkamah Tinggi sedang mendengar rayuan terhadap KA dan bukannya permohonan mengetepikan di bawah s 15 APAIP. Pendekatan yang betul adalah, walaupun keputusannya mungkin berbeza jika pertikaian itu telah dibawa ke hadapan hakim Mahkamah Tinggi pada peringkat pertama, hakim itu tidak seharusnya mengganggu KA yang berdasarkan kesimpulan fakta dan undang-undang yang berhak dibuat oleh adjudikator di bawah undang-undang. Hakim Mahkamah Tinggi telah bertindak di luar sempadannya apabila dia memutuskan untuk mengganggu KA atas dapatan fakta dan undang-undang. Walaupun boleh dikatakan bahawa Mahkamah akan membuat keputusan yang berbeza daripada adjudikator, ini dengan sendirinya bukanlah asas untuk mengenepikan KA atas alasan pelanggaran keadilan semula jadi (lihat perenggan 51).

(9) Terdapat kewajipan menyeluruh ke atas adjudikator untuk memberikan KA dalam tempoh masa yang terhad. Seksyen 12(2) APAIP memberi mandat bahawa KA perlu diberikan dalam tempoh 45 hari dari

penyampaian jawapan adjudikasi, jika gagal, KA itu terbatal. Dikekang oleh had masa, adjudikator harus diberi sedikit kelonggaran dalam menentukan laluannya,termasuk budi bicaranya untuk memuktamadkan prosedurnya sendiri untuk mengendalikan pertikaian di hadapannya. Keengganan adjudikator untuk membenarkan YTL memfailkan pencantuman lanjutan adalah mengikut budi bicara adjudikator dan tidak seharusnya menjadi asas untuk mengenepikan KA atas alasan pelanggaran keadilan semula jadi (lihat perenggan 52–53).]

Cases referred to

ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal [2016] MLJU 1776; [2016] CLJU 1522, CA (refd)

AMEC Group Ltd v Thames Water Utilities Ltd [2010] EWHC 419 (TCC), QBD (refd)

ATSA Architects Sdn Bhd v Teguh Majuria Sdn Bhd and another case [2022] MLJU 3329; [2022] 1 LNS 3037, HC (refd)

Balfour Beatty Construction Ltd v Lambeth London Borough Council [2002] EWHC 597 (TCC), QBD (refd)

Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd [2015] MLJU 941, HC (refd)

Broughton Brickwork Ltd v F Parkinson Ltd [2014] EWHC 4525 (TCC), QBD (refd)

Cantillon Limited v Urvasco Limited [2008] EWHC 282 (TCC), QBD (refd)

Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358, CA (refd)

Cescon Engineers Sdn Bhd v Pesat Bumi Sdn Bhd and another case [2022] 9 MLJ 79, HC (refd)

Foster Wheeler E & C (Malaysia) Sdn Bhd v Arkema Thiochemicals Sdn Bhd and another case [2015] MLJU 1952; [2015] CLJU 632, HC (refd)

Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd [2018] SGCA 66; [2018] 2 SLR 1311, CA (refd)

Guangxi Dev & Cap Sdn Bhd v Sycal Bhd [2018] MLJU 1542; [2019] 1 CLJ 592; [2019] 6 MLRA 710, CA (refd)

Hutton Construction Ltd v Wilson Properties (London) Ltd [2017] EWHC 517 (TCC), QBD (refd)

Integral Acres Sdn Bhd v BCEG International (M) Sdn Bhd and other cases [2021] MLJU 1889; [2021] 1 LNS 1620, HC (refd)

J&B Hopkins Ltd v A&V Building Solution Ltd [2023] EWHC 301 (TCC), QBD (refd)

Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd and another appeal [2019] 1 MLJ 334, CA (refd)

Lloyd v McMahon [1987] AC 625, HL (refd)

MRCB Builders Sdn Bhd v Wazam Ventures Sdn Bhd and another case [2020] MLJU 208; [2020] CLJU 145, HC (refd)

Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] EWHC Tech 254, QBD (refd)
PBS v Bester [2018] EWHC 1127 (TCC), HC (refd)
Pilon Ltd v Breyer Group plc [2010] EWHC 837 (TCC), QBD (refd)
Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals [2015] MLJU 1873; [2015] 1 LNS 1435, HC (refd)
Seal Properties (KL) Sdn Bhd v Wabina Constructions & Engineering Sdn Bhd [2021] MLJU 1045; [2021] 1 LNS 853; [2021] 5 MLRH 278, HC (refd)
Subang Skypark Sdn Bhd v Arcradius Sdn Bhd [2015] 11 MLJ 818; [2015] 10 CLJ 801, HC (refd)
TYL Land and Development Sdn Bhd v SIS Integrated Sdn Bhd and another case [2018] MLJU 217; [2018] 1 LNS 145, HC (refd)
View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22; [2019] 5 CLJ 479, FC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 5, 6, 7, 8, 9, 10, 11, 12, 12(1), (2), (2)(a), (2)(b), 13(c), 15, 15(a), (b), (c), (d), 24, 24(c), 25, 25(a), (b), (j), 28
Rules of Court 2012 O 69A rr 3, 5

Appeal from: *TSR Bina Sdn Bhd v Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd and another case* [2021] MLJU 1504 (High Court, Kuala Lumpur)

Andrew Heng Yeng Hoe (with Roger Leong Chun Lim) (Zain Megat & Murad) for the appellant.
Sarasvathi Kulaveerasingam (with Lim Kong Soon) (Dorairaj Low & Teh) for the respondent.

Che Mohd Ruzima JCA:

INTRODUCTION

[1] There are two related matters filed in the Kuala Lumpur High Court. First, an application by TSR Bina Sdn Bhd ('TSR') pursuant to s 28 of the Construction Industry Payment and Adjudication ACT 2012 ('the CIPAA') and O 69A r 5 of the Rules of Court 2012 ('the ROC') and/or the inherent jurisdiction of the court via an Originating Summons No WA-24C-249–12 of 2020 ('OS 249') to enforce the adjudication decision dated 5 February 2020 ('AD') decided by the learned adjudicator ('LA'). Second, an application by Sykt Pembenaan Yeoh Tiong Lay Sdn Bhd ('YTL') pursuant to s 15 of the CIPAA, O 69A r 3 of the ROC and/or the inherent jurisdiction of the court via an Originating Summons No WA-24C-8–02 of 2021 ('OS 8') to set aside the AD or alternatively, to stay the enforcement of the AD pending the disposal of the arbitration proceedings. Both OS were heard together and at the end of the

proceedings, the learned High Court judge ('LHCJ') allowed YTL's OS 8 and dismissed TSR's OS 249. Aggrieved by the decisions TSR appealed.

[2] TSR's appeal against the High Court decision in OS 8 is registered as Civil Appeal No W-02(C)(A)-1352–07 of 2021 ('Appeal 1352') and TSR's appeal against the High Court decision in OS 249 is registered as Civil Appeal No W-02(C)(A)-1353–07 of 2021 ('Appeal 1353'). Before us, both appeals were heard together.

BRIEF BACKGROUND FACTS

[3] On 27 October 2016 the Government of Malaysia appointed CRCC CREC CCCC Consortium Sdn Bhd ('CCC Consortium') as the main contractor for the design, construction, supply, installation, completion, testing, commissioning and maintenance of the electrified double track from Gemas to Johor Bahru ('the said project').

[4] Then, on 31 November 2017 CCC Consortium appointed SIPP-YTL JV, the unincorporated joint venture formed between YTL and SIPP Rail Sdn Bhd as the main subcontractor. By letter of award (LOA) dated 4 January 2019, YTL appointed TSR as the subcontractor to undertake the work known as site clearance and embankment earthwork with all associated works ('subcontract works') for the total sum of RM307,306,227.05.

[5] TSR commenced the subcontract works. TSR submitted the progress payment application for Interim Payment No 1 ('IP1') on 10 April 2019. In response, YTL issued an Interim Payment Certificate No 1 ('IPC No 1') on 25 April 2019 certifying work done amounting to RM920,000. On 2 May 2019 TSR submitted a progress payment application for Interim Payment No 2 ('IP2') and YTL issued an Interim Payment Certificate No 2 ('IPC No 2') certifying work done amounting to RM767,200. Then, on 31 May 2019 TSR submitted a progress payment application for Interim Payment No 3 to YTL for the sum of RM3,090,358.59 ('IP3'). On 10 June 2019, YTL issued a revised IPC No 1 dated 25 May 2019 for an increased certified sum of RM976,100.

[6] Dissatisfied with the progress of the subcontract works performed by TSR, YTL issued a notice of default to TSR on 21 June 2019. TSR contested and objected to the notice of default but was unsuccessful. Following that, YTL issued a notice of termination to terminate TSR's subcontract on 1 July 2019.

[7] Despite the issuance of the IPCs, that are, the revised IPC No 1 and IPC No 2, YTL did not make any payment to TSR. Aggrieved, TSR initiated an adjudication proceeding via Adjudication Reference No

AIAC/D/ADJ-2779–2019 under the CIPAA against YTL to recover the certified sum pursuant to revised IPC No 1 and IPC No 2.

[8] On 5 February 2020, the LA handed down the AD and ordered, amongst others, that the total adjudicated sum of RM1,106,503.46 must be paid by YTL to TSR on or before 19 February 2020. YTL was also ordered to pay interest at the rate of 5%pa on any part of the adjudicated sum which remained unpaid and finally, YTL was to pay the costs of the adjudication proceedings amounting to RM33,559.74 on or before 19 February 2020.

[9] Further to the above, TSR had also issued a notice of arbitration against YTL to challenge, inter alia, the unlawful termination and the arbitration is currently ongoing via Arbitration Reference No AIAC/D/ADM-741–2019.

[10] Following YTL's failure to make any payment in compliance with the AD, TSR sought to enforce the AD via OS 249. In response, YTL applied to set aside the AD via OS 8.

HIGH COURT'S DECISION

[11] The LHCJ began by analysing YTL's application to set aside AD via OS 8. Primarily, the LHCJ found that TSR had raised new issues in the adjudication reply, thus, denying YTL the opportunity to respond which the adjudicator was obliged to do under para s 24(c) of the CIPPA. The new issues, which formed part of the LA's findings are on the critical events of delay and also TSR's entitlement to extension of time ('EOT') for the delay, which will finally determine the amount of the liquidated ascertained damages ('LAD').

[12] The refusal by the LA to permit a further reply had denied YTL the opportunity to submit on the new issues raised which have considerable importance to the outcome of the dispute. If YTL had been allowed to further reply, there is a real possibility that the LA would have arrived at a different conclusion. Therefore, the LA's rejection on YTL's request for further submission had deprived the right and opportunity to present a complete defence, in violation of the *audi alteram partem* rule of natural justice. The breach of natural justice is material and not merely peripheral to the AD and this sole reason justifies the setting aside of the AD pursuant to para s 25(b) of the CIPPA.

[13] Notwithstanding that, the LHCJ dismissed all the other grounds proffered by YTL in its application to set aside the AD, such as the contention that the LA:

(a) went on a frolic of his own when he made certain observations as to the late issuance of IPC No 1;

(b) failed to act independently and impartially within the meaning of para s 15(c) of the CIPPA;

(c) acted beyond his jurisdiction in making findings of facts and law on issues which were not raised or pleaded;

(d) committed errors of fact and/or law in the AD;

(e) failed to appreciate the fact that TSR had adopted a tactical manoeuvre in addressing the defences raised by YTL in the payment response; and

(f) failed to find that TSR had acted in an oppressive manner or mala fide when it referred the dispute to both adjudication and arbitration.

[14] Following from the decision of OS 8, the LHCJ dismissed TSR's application to enforcement the AD via OS 294.

THE APPEAL

[15] TSR's grounds for appeal as mounted in the memorandum of appeal are as follows:

1. The Learned Judge erred in fact and/or in law in allowing the application to set aside the Adjudication Decision dated 05.02.2021 on the ground that there has been a denial of natural justice when the Adjudicator denied the requests for further rejoinder notwithstanding that:

1.1 There is no automatic right for the Respondent to submit further response and/or rejoinder;

1.2 The Adjudicator has an overarching duty to render an adjudication decision within 45 working days; and

1.3 The Respondent failed to demonstrate there is any material and/or decisive breach of natural justice.

2. The Learned Judge erred in fact and/or in law in allowing the application to set aside the Adjudication Decision on the ground that there has been a denial of natural justice arising from the Adjudicator purportedly going on a frolic of his own, notwithstanding that:

2.1 The Adjudicator was entitled to make a fair and objective observation based on the documents which had been submitted to the Adjudicator.

2.2 The Adjudicator's observation challenged by the Respondent, which is not even a ground of the findings, is merely peripheral in nature.

2.3 The Adjudicator was clothed with the jurisdiction to decide on the issue of Extension of Time and in granting the appropriate extension of time in the circumstances of the case.

3. The Learned Judge erred in fact and/or in law in allowing the application to set aside the Adjudication Decision on the ground that the Adjudicator failed to consider or take into account matters raised by the Respondent in the Adjudication notwithstanding that such challenges are challenge on the merit of the Adjudication Decision and cannot be permitted in an application to set aside the Adjudication Decision.

4. The Learned Judge erred in fact and/or in law in allowing the application to set aside the Adjudication Decision on the ground that the Adjudicator purportedly committed errors in making the Adjudication Decision notwithstanding that such challenges are challenge on the merit of the Adjudication Decision and cannot be permitted in an application to set aside the Adjudication Decision.

5. This Memorandum of Appeal is filed without the benefit of the High Court's grounds of Judgment and therefore, the Appellant reserve its rights to add and/or vary this Memorandum of Appeal when the said grounds are given by the High Court.

SUMMARY OF TSR'S SUBMISSION

[16] The LHCJ erred in holding that there is a breach of natural justice since there is no automatic right for YTL to submit further response/rejoinder to the adjudication reply which is clearly subject to the discretion of the LA as provided under para s 25(j) of the CIPPA. The decision in the case of *MRCB Builders Sdn Bhd v Wazam Ventures Sdn Bhd and another case* [2020] MLJU 208; [2020] CLJU 145 (*Wazam Ventures*'s case) was referred.

[17] The LHCJ erred in law and/or in fact in concluding that the LA's determination on TSR's entitlement to EOT for the critical events, was based on the 'new issues' raised by TSR in the adjudication reply without any opportunity for YTL to submit further on the same. There are no 'new issues' raised by TSR, considering that:

(a) the issues pertaining to delay in progress works were brought up by YTL in the payment response and/or adjudication response;

(b) the issue of delay and TSR's failure to attain the respective key access handover date for all four locations are the central thrust of YTL's defence to TSR's claim;

(c) YTL had even raised the issue pertaining to TSR's application for EOT as well as YTL's granting of EOT in its adjudication response;

(d) the issues of delays, EOT and LAD had been clearly addressed to YTL by TSR in its documents; and

(e) all the documents were exchanged between the parties even before YTL served its payment response and/or adjudication response to TSR.

Hence, such issues and/or documents referred to and submitted in the adjudication reply are always within the knowledge of YTL and they are not new facts or issues as alleged. The issues of events of default, delay, EOT and/or LAD were raised by YTL in its adjudication response and TSR is clearly entitled to reply to those issues in its adjudication reply, and they cannot be deemed as 'new issues' raised. YTL should have raised, revealed and/or submitted all those issues and/or documents in its adjudication response and not wait until after the adjudication reply as YTL always has full knowledge of the same. The decisions in *ATSA Architects Sdn Bhd v Teguh Majuria Sdn Bhd and another case* [2022] MLJU 3329; [2022] 1 LNS 3037 and *TYL Land and Development Sdn Bhd v SIS Integrated Sdn Bhd and another case* [2018] MLJU 217; [2018] 1 LNS 145 were referred to.

[18] Further, the LHCJ erred in finding that the breach of natural justice is material and that there is a real possibility that the LA would have arrived at a different conclusion on the issues if YTL's application for further response/submissions was allowed. YTL failed to evince that the alleged breach is material and there is a real possibility that the LA would have arrived at a different conclusion should further response/rejoinder be allowed. The decision as held in the cases of *Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals* [2015] MLJU 1873; [2015] 1 LNS 1435, *Guangxi Dev & Cap Sdn Bhd v Sycal Bhd* [2018] MLJU 1542; [2019] 1 CLJ 592; [2019] 6 MLRA 710 and *Wazam Ventures*'s case were referred to.

[19] Finally, TSR argued that the LA has an overarching duty to render the AD within 45 working days from the service of the adjudication reply. The failure to do so will render the AD void pursuant to s 12 of the CIPAA. To allow any further reply will have the effect of throwing the adjudication proceeding into disarray as the LA merely has 45 working days to render the AD. In support thereof, the decision in *Wazam Ventures*'s case and *Integral Acres Sdn Bhd v BCEG International (M) Sdn Bhd and other cases* [2021] MLJU 1889; [2021] 1 LNS 1620 were referred to.

SUMMARY OF YTL'S SUBMISSION

[20] The LHCJ did not err in setting aside the LA pursuant to s 15 of the CIPAA on the ground of 'a denial of natural justice'. As acknowledged by Her Ladyship, both TSR and YTL filed extensive written submissions and those submissions were carefully analysed and considered as can be seen in the grounds of judgment ('GOJ') of the LHCJ.

[21] As to the outlined the test on what is meant by a denial of natural justice within the context of s 15 of the CIPAA, the decisions in *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal* [2016]

MLJU 1776; [2016] CLJU 1522, *Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd and another appeal* [2019] 1 MLJ 334, *Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals* [2015] MLJU 1873; [2015] 1 LNS 1435, *Cescon Engineers Sdn Bhd v Pesat Bumi Sdn Bhd and another case* [2022] 9 MLJ 79 and *Cantillon Limited v Urvasco Limited* [2008] EWHC 282 (TCC) were referred to.

[22] The LHCJ rightly held that there was a breach of natural justice when the LA rejected YTL's request to submit a further response after the adjudication reply. Via a letter dated 9 December 2019, YTL's solicitors informed the LA that there are new issues and allegations raised in the adjudication reply, which require and warrant further response or submissions. YTL's request for further response or submissions was rejected by the LA.

[23] The LHCJ correctly analysed the correspondences by parties, adjudication claim, adjudication response and adjudication reply, adjudication decision as well as affirmations and submissions before reaching to a conclusion that there is a breach of natural justice arising from the adjudicator's refusal to allow a further response to four new issues raised in the adjudication reply as follows:

(a) new documents and detailed explanations given by TSR as to the non-submission of the performance bond;

(b) new documents and detailed explanations on the reasons for the delay in progress of the subcontract works to justify EOT;

(c) TSR's allegation on wrongful and unlawful termination of the subcontract; and

(d) further and detailed explanation by TSR in disputing YTL's entitlement to LAD as a valid defence and set off to TSR's claim.

[24] The LA's refusal to allow a further response on the new issues was followed by the glaring inconsistencies in the AD, in particular, on the assessment of EOT. The LHCJ recognised the inconsistencies in the AD and made those observations in her GOJ. Hence, the LHCJ rightly concluded that the new issues ultimately led to the LA's erroneous findings on the events of delay, EOT and LAD.

[25] Therefore, there are no appealable errors by the LHCJ in setting aside the AD pursuant to s 15 of the CIPAA on grounds of breach of natural justice.

A OUR DECISION

[26] The law on challenging an adjudication decision is clear. Section 15 of the CIPAA provides recourse for the aggrieved party against the improperly procured adjudication decision. It entitles the aggrieved party to apply to the B High Court to set aside the adjudication decision based on the limited grounds provided in paras 15(a) to (d) of the CIPAA as follows:

> 15 Improperly procured adjudication decision
>
> An aggrieved party may apply to the High Court to set aside an adjudication C decision on one or more of the following grounds:
>
> (a) the adjudication decision was improperly procured through fraud or bribery;
>
> (b) there has been a denial of natural justice;
>
> D
>
> (c) the adjudicator has not acted independently or impartially; or
>
> (d) the adjudicator has acted in excess of his jurisdiction.

[27] The relevant general principle in the enforcement of an adjudication E decision can be found in the earliest decision of Dyson J (as he then was) in *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] EWHC Tech 254 in which it was made clear that an adjudication decision will be enforced by summary judgment, regardless of errors of law or errors of fact contained within it, or the merits of the underlying dispute resolve by the adjudicator. In F *AMEC Group Ltd v Thames Water Utilities Ltd* [2010] EWHC 419 (TCC) Coulson J (as he then was) held that an adjudicator does not need to provide an answer to each and every issue which may be raised in the parties' submission. Later, in *Pilon Ltd v Breyer Group plc* [2010] EWHC 837 (TCC) the same judge held that an inadvertent failure to consider an issue within the dispute G will not ordinarily render an adjudication decision unenforceable. In *Broughton Brickwork Ltd v F Parkinson Ltd* [2014] EWHC 4525 (TCC) Stephen Davies J held that an inadvertent failure by the adjudicator to consider a particular document was at its highest, to be procedural error which did not H amount to a breach of natural justice. Then, in *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC), Coulson J held that 'If the decision was within the adjudicator's jurisdiction and the adjudicator broadly acted in accordance with the rules of natural justice, such defendants must pay now and argue later'. Meanwhile, in *PBS v Bester* [2018] I EWHC 1127 (TCC) Stuart-Smith J explained the rationale of the court's approach on enforcement of an adjudication decision as follows:

> Adjudication is all about interim cash flow and it is routine to enforce decisions that required substantial allocations of cash to one party or another in the knowledge

that it may prove to be merely an interim measure. The fact that the basis of an adjudicator's decision is to be challenged in other proceedings is of itself seldom, if ever, a ground for non-enforcement.

[28] As regards to the appeal before us, it is pertinent to note that the LHCJ allowed YTL's setting aside application via OS 8 solely on the ground that there is a breach of natural justice. Her Ladyship dismissed all the other grounds proffered by YTL and no appeal lodged by YTL against those findings of the LHCJ. In light of the above, there is only one issue to be determined by this court, that is, whether the LHCJ is correct in law and/or in fact in finding that there is a breach of natural justice in the LA's AD.

[29] On the point at issue, the adjudicator is duty bound to observe the principles of natural justice in exercising his obligations as stipulated under para 15(b) of the CIPAA. With respect to rule of natural justice, we should be mindful of the reminder of Lord Bridge in the case of *Lloyd v McMahon* [1987] AC 625. At p 702 His Lordship said this:

> My Lords, the so called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-establish that when statute has conferred on anybody the power to make decision affecting individual, the court will not only require the procedure prescribe by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedure safeguard as will ensure the attainment of fairness ...

[30] In relation to the compliance of the rule of natural justice related to an adjudication decision, HHJ Lloyd QC in *Balfour Beatty Construction Ltd v Lambeth London Borough Council* [2002] EWHC 597 (TCC) at para 28 made the following observation:

> Is the adjudicator obliged to inform the parties of the information that he obtains from his own knowledge and experience or from other sources and of the conclusions which he might reach, taking those sources into account? In my judgment it is now clear that, in principle, the answer may be: Yes. Whether the answer is in the affirmative will depend on the circumstances. The reason lies, at least in part, in the requirement that the adjudicator should act impartially. That must mean that he must act in a way that will not lead an outsider to conclude that there might be any element of bias, i.e. that a party has not been treated fairly. In addition, impartiality implies fairness although its application may be trammelled by the overall constraints of adjudication. Lack of impartiality carries with it overtones of actual or apparent bias when it in reality the complaint may be better characterised as a lack of fairness. Judge Bowsher QC put it very well in *Discain*

Project Services Limited (No 1) when he said at p 405:

> I do understand that adjudicators have great difficulties in operating this statutory scheme, and I am not in any way detracting from the decision in *Macob*. It would be quite wrong for the parties to search around for breaches of the rules of natural justice. It is a question of fact and degree in each case, and in this case the adjudicator overstretched the rules.
>
> ...
>
> That scheme makes regard for the rules of natural justice more rather than less important. Because there is no appeal on fact or law from the adjudicator's decision, it is all the more important that the manner in which he reaches his decision should be beyond reproach. At the same time, one has to recognise that the adjudicator is working under pressure of time and circumstance which makes it extremely difficult to comply with the rules of natural justice in the manner of a court or an arbitrator. Repugnant as it may be to one's approach to judicial decision-making, I think that the system created by the [HGCRA] can only be made to work in practice if some breaches of the rules of natural justice which have no demonstrable consequence are disregarded.
>
> The last sentence shows that the question that I posed cannot be given an unqualified answer as the facts have to be taken into account.

On the same subject matter, the guidelines laid down by Akenhead J in *Cantillon Limited v Urvasco Limited* [2008] EWHC 282 (TCC) as to the circumstances which may result in a breach of natural justice and thereby exposing the AD to be set aside are pertinent. At para 57 His Lordship concluded as follows:

(a) it must be first established that the adjudicator failed to apply the rules of natural justice;

(b) any breach of the rules must be more than peripheral; they must be material breaches;

(c) breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant;

(d) whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this; and

(e) it is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving parties the opportunity to comment, or where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of *Balfour Beatty Construction v The London Borough of Lambeth* [2002] was concerned comes into play. It follows that, if either party has argued a particular point

and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto.

[31] Back to our jurisdiction, the principles of natural justice related to an adjudication decision have been deliberated upon and decided in a number of cases. The highest authority will be the decision of the Federal Court in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22; [2019] 5 CLJ 479 which is also a decision in the context of setting aside an adjudication decision. The observations made by the Federal Court are as follows:

[64] It follows that the 'duty and obligation of the adjudicator' as spelt out in s 24(c) of CIPAA that 'he shall comply with the principles of natural justice' would oblige him to consider all the defences raised by the appellant in its adjudication response as a matter of fairness and impartiality.

[65] We are of the view that an adjudicator who wrongly rules out considering a defence presented to him would be in breach of natural justice. This point arose in *Pilon Ltd v Breyer Group plc* [2010] EWHC 837 (TCC) which like in our present case was concerned with progress claims that were cumulative in nature. The decision by Justice Coulson bears close reading. At [24–28] the learned judge observed:

24. It seems to me clear beyond doubt that the adjudicator erred in failing to take into account Breyer 's defence by reference to the overpayment on batches 1–25. Whilst he was quite correct to regard the notice of adjudication as setting out the boundaries of his jurisdiction, he failed to appreciate that what *Pilon* were seeking by that notice was not only an interim valuation of batches 26–62, but also an interim payment of any sum considered owing to them ...

25. It is not uncommon for adjudicators to decide the scope of their jurisdiction solely by reference to the words used in the notice of adjudication, without having regard to the necessary implications of the words ...

26. As a result, an adjudicator should think very carefully before ruling out a defence merely because there was no mention of it in the claiming party's notice of adjudication. That is only common sense: it would be absurd if the claiming party could, through some devious bit of drafting, put beyond the scope of the adjudication the defending party's otherwise legitimate defence to the claim.

27. I understand that it may be tempting for a claiming party in an adjudication to seek to limit the adjudicator's jurisdiction in a way in which that party believes to be to its advantage ... It was their case that the over-payment claim was outside the adjudicator's jurisdiction, and that is what they (successfully) urged on the adjudicator. Thus, this is a case where *Pilon* sought a tactical advantage by putting forward an erroneous statement of the adjudicator's jurisdiction and, as the decision in *Quartzelec* shows that can be a dangerous tactic to adopt.

28. In the result therefore, I consider that the adjudicator deliberately placed an erroneous restriction on his own jurisdiction, which amounted to a breach of natural justice ...

[66] Based on the above decision of *Pilon Ltd* the adjudicator had likewise in our

A case, wrongly construed the scope of his jurisdiction under s 27(1) of CIPAA in refusing to consider all the defences raised in the adjudication response. Therefore, such a decision by the adjudicator cannot stand.

In *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal* [2016] MLJU 1776; [2016] CLJU 1522 ('*ACFM Engineering & Construction Sdn Bhd*'s case') this court held that:

> [19] When one speaks of natural justice, it is nothing more than what we call the concept of 'procedural fairness' which needs to be accorded to the parties in a dispute of a hearing. In this appeal the appellants complaint on the breach of natural justice is contained in pp 15–19 of his written submission. We informed counsel for the appellant that it appeared that his complaint about the decision of the adjudicator related substantially to the manner in which the adjudicator arrived at his decision after evaluating the evidence provided to him and that would only be questioning the findings of fact by the adjudicator learned counsel for the appellant was not able to convince us that our view was wrong when we also pointed out to him that in his submission he had contended that the adjudicator had premised his decision on 'his own assessment' (see para 11.4 of submission).
>
> ...
>
> [21] There were no complaints by the appellant that the adjudicator had got the disputes on a completely wrong footing. In fact, no complaint was made at all and the adjudication process was carried out premised on those issues. If we were to consider the complaints of the appellant, we would be looking into the merits of the decision of the adjudicator. In the context of s 15 of CIPAA 2012, it cannot be the function of the court to look into or review the merits of the case or to decide the facts of the case. The facts are for the adjudicator to assess and decide on. The court's function is simply to look at the manner in which the adjudicator conducted the hearing and whether he had committed an error of law during that process. Such error of law relates to whether he had accorded procedural fairness to the appellant In the context of this case, the complaints of the appellant were nothing but complaints of factual findings of the adjudicator which in our view cannot be entertained by us.

High Court in *Seal Properties (KL) Sdn Bhd v Wabina Constructions & Engineering Sdn Bhd* [2021] MLJU 1045; [2021] 1 LNS 853; [2021] 5 MLRH 278 held that the dissatisfaction of a party on the findings made by the adjudicator does not amount to a breach of natural justice. Whereas, in *Wazam Ventures*'s case it was held that CIPAA does not provide a right for a respondent in an adjudication to file a rejoinder and the exercises of discretion under para 25(a) and (j) of the CIPAA to refuse an application to file a rejoinder does not in itself amounts to a breach of natural justice within the meaning of paras 15(b) and 24(c) of the CIPAA.

[32] Further, it is pertinent to note that an alleged breach of natural justice must not be any breach but must be a material breach, and not merely peripheral. This was pointed out in the case of *Guangxi Dev & Cap Sdn Bhd v Sycal Bhd* [2018] MLJU 1542; [2019] 1 CLJ 592; [2019] 6 MLRA 710

where this court observed as follows:

> [32] This brings us to the final issue of whether the breach of natural justice was a material breach. It is accepted law that any breach of natural justice must not be peripheral but must be a material breach affecting the outcome of the resolution of the dispute (see *Cantillon Limited v Urvasco Limited* [2008] EWHC 282 (TCC)). However, in determining this question, it is not necessary to investigate all the facts to decide if the adjudicator would have arrived at a different conclusion if the matters included in the response were considered. All that needs to be considered is whether there was a real possibility of a different conclusion (see *CJP Builders Ltd v William Verry Ltd* [2008] EWHC 2015 (TCC)).

[33] In the instant appeal before us, the crux of TSR's argument is that the LHCJ should have held that there is no breach of natural justice in the AD by the simple reason that there is no automatic right for YTL to submit further response/rejoinder after the adjudication reply since there are no 'new issues' raised in the reply. Moreso, the submission of further response/rejoinder is clearly subject to the discretion of the LA as provided under para 25(j) of the CIPAA.

[34] First and foremost, in order to deliberate further on the issue at hand, we are mindful of the procedural requirements imposed on, the duties and obligations undertaken by, and the powers given to the LA under ss 12, 24 and 25 of the CIPAA respectively. For ease of reference, the procedural requirements imposed on the LA spelt out in s 12 are as follows:

> 12 Adjudication and decision
>
> (1) The adjudicator shall conduct the adjudication in the manner as the adjudicator considers appropriate within the powers provided under section 25.
>
> (2) Subject to subsection 19(5), the adjudicator shall decide the dispute and deliver the adjudication decision within —
>
> (a) forty-five working days from the service of the adjudication response or reply to the adjudication response, whichever is later;
>
> (b) forty-five working days from the expiry of the period prescribed for the service of the adjudication response if no adjudication response is received; or
>
> (c) such further time as agreed to by the parties
>
> (3) An adjudication decision which is not made within the period specified in subsection (2) is void.
>
> (4) The adjudication decision shall be made in writing and shall contain reasons for such decision unless the requirement for reasons is dispensed with by the parties.
>
> (5) The adjudication decision shall also determine the adjudicated amount and the time and manner the adjudicated amount is payable.

(6) The adjudicator shall serve a copy of the adjudication decision, including any corrected adjudication decision made under subsection (7), on the parties and the Director of the KLRCA.

(7) The adjudicator may at any time correct any computational or typographical error on the adjudicator's own initiative or at the request of any party.

(8) The enforcement of the adjudication decision shall not be affected in any way by a request for correction under subsection (7) and any correction made is deemed to take effect from the date of the original adjudication decision.

(9) The Evidence Act 1950 [Act 56] shall not apply to adjudication proceedings under this Act.

The duties and obligations undertaken by the LA as provided under s 24 are as follows:

24 Duties and obligations of the adjudicator

The adjudicator shall at the time of the acceptance of appointment as an adjudicator make a declaration in writing that —

(a) there is no conflict of interest in respect of his appointment;

(b) he shall act independently, impartially and in a timely manner and avoid incurring unnecessary expense;

(c) he shall comply with the principles of natural justice; and

(d) there are no circumstances likely to give rise to justifiable doubts as to the adjudicator's impartiality and independence.

Meanwhile, the powers given to the LA under s 25 are as follows:

25 Powers of the adjudicator

The adjudicator shall have the powers to —

(a) establish the procedures in conducting the adjudication proceedings including limiting the submission of documents by the parties;

(b) order the discovery and production of documents;

(c) set deadlines for the production of documents;

(d) draw on his own knowledge and expertise;

(e) appoint independent experts to inquire and report on specific matters with the consent of the parties;

(f) call for meetings with the parties;

(g) conduct any hearing and limiting the hearing time;

(h) carry out inspection of the site, work, material or goods relating to the dispute including opening up any work done;

(i) inquisitorially take the initiative to ascertain the facts and the law required for the decision;

(j) issue any direction as may be necessary or expedient;

(k) order interrogatories to be answered;

(l) order that any evidence be given on oath;

(m) review and revise any certificate issued or to be issued pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute;

(n) decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter;

(o) award financing costs and interest; and

(p) extend any time limit imposed on the parties under this Act as reasonably required.

[35] As the above statutory scheme should be understood, it is comprehensible that sub-s 12(1) of the CIPAA reinforces the general principle that the adjudicator is the master of his own procedure. However, the discretions conferred upon the adjudicator are not unfettered since the provisions of s 12 itself specifically stipulate that the adjudicator has to conduct the adjudication 'within the powers provided under s 25'. It is apparent that s 25 of the CIPPA provides a list of procedural matters that empowers and enables the adjudicator to conduct the adjudication proceedings in an inquisitorial manner to ensure expeditious and effective adjudication proceedings. Mindfully, the adjudicator has to comply with the time frame to deliver his decision as set out in paras 12(2)(a) and (b) of the CIPAA.

[36] As to the procedure to be adopted in the adjudication proceedings, it is clear that under para s 25(a) of the CIPPA the adjudicator shall have the power to establish the procedures that govern the adjudication proceedings, including limiting the submission of documents by the parties. Thus, it is for the adjudicator to decide on the best route map as to how best to establish the facts and the law in an adjudicating proceedings and the adjudicator's decisions must be consistent with the procedure set to govern the proceedings. Depending on the nature and scope of the adjudication, the adjudicator is empowered to determine whether to proceed entirely on the written submissions of the parties, or meeting with the parties, or combination of both.

[37] In line with the powers given to the adjudicator under the law, we are constrained to form a view that the adjudicator has the sole discretion as to whether to allow or reject any further response/rejoinder after the filing of the adjudication reply. However, such discretion shall always be subjected to the compliance with the rule of natural justice as required under para s 24(c) of the CIPPA.

[38] Back to the appeal before us, it is not disputed that the parties had complied with all the deadlines as stipulated under ss 5 to 11 of the CIPAA. The compliances are apparent from the date of the actions taken by the parties as follows:

(a) payment claim dated 18 July 2019;

(b) payment response dated 2 August 2019;

(c) adjudication claim dated 11 November 2019;

(d) adjudication response dated 25 November 2019; and

(e) adjudication reply dated 5 December 2019.

The LA acknowledged those compliances as it were stated in the AD that can be seen at pp 105 to 130 common core bundle filed in encl 46 ('CCB').

[39] Upon receiving the adjudication reply dated 5 December 2019, YTL sent a letter dated 9 December 2019 informing the LA that there are some 'new issues' raised by TSR in the adjudication reply that were never raised in the adjudication response which require and warrant a further response/rejoinder from YTL. Some 'new issues' allegedly raised by TSR are, inter alia:

(a) new documents and detailed explanations given by TSR as to reasons for the non-submission of the performance bond ('PB');

(b) new documents and detailed explanations given by TSR as to reasons for the delay in the progress of the subcontract works to justify its application for EOT;

(c) TSR's allegations on wrongful and unlawful termination of the subcontract works; and

(d) further and detailed explanation given by TSR in disputing YTL's entitlement to LAD as a valid defence and set off to TSR's claim.

YTL urged the LA to exercise his power under para s 25(j) of the CIPPA to allow YTL to serve a further response/rejoinder to the 'new issues' raised by TSR. See pp 233 to 235 CCB.

[40] Then, TSR objected to YTL's request for further response/rejoinder via its letter to the LA dated 11 December 2019 citing the reason that:

(a) YTL's failure to identify the 'new documents';

(b) the non-submission of PB is not a new issue and most of the supporting documents are within the parties' knowledge and possession;

(c) the delay in progress of the subcontract works is not a new issues since that YTL had repeatedly mention it in the payment response and adjudication response and in fact it was previously discussed in the TSR's application for EOT; and

(d) the wrongful and unlawful termination of the subcontract works has never been a new issue to both parties and has been within the best knowledge of YTL.

TSR argued that it shall not be fair and proper to allow YTL to submit further response/rejoinder and reminded the LA to consider the effects of an AD which is not delivered within the time frame specified in sub-s 12(2) of the CIPAA. See pp 241 to 246 CCB.

[41] On the same day, 11 December 2019, YTL responded to TSR's letter. In the said letter, YTL re-emphasised the 'new issues' and arguments were never raised at all in the adjudication claim and/or adjudication response. Some of the documents were never referred to or produced by TSR in the adjudication claim but only produced for the first time in the adjudication reply, denying YTL's opportunity to comments on or respond to them. YTL reiterates that it is only fair and proper for them to be given the opportunity to respond to the 'new issues' raised by TSR. See pp 236 to 240 of the CCB.

[42] After having reviewed and considered YTL's application for further response, TSR's reply to the YTL's application, and both parties' submissions including respective adjudication claim, adjudication response and adjudication reply, the LA decided to reject YTL's application pursuant to para 25(a) of the CIPPA. The grounds given by the LA at para 2 of his letter to YTL and TSR, and copied to the Director of the Asian International Arbitration Centre are as follows:

(a) Both Parties have been allowed fairly and accordingly for their submission under the provisions of the CIPAA 2012 i.e. the Adjudication Claim by the Claimant, the Adjudication Response by the Respondent and the Adjudication Reply by the Claimant;

(b) All the submissions now are clear and satisfied for me to make the Adjudication Decision;

(c) I will issue further directive under the provisions of the CIPAA 2012 for additional submission if there is a necessity.

See the LA's letter dated 16 December 2019 ('LA's letter') at p 249 CCB.

[43] From the LA's letter, it is apparent that each and every reason forwarded by YTL in its application for further response/rejoinder, and every responding reason of objection given by TSR had been considered by the LA. Those considerations can be clearly seen from the answers given by the LA. In his final

conclusion, the LA is of the opinion that both parties had been fairly allowed to submit in the adjudication proceedings and for him, all submissions submitted by the parties were clear and sufficient for him to make the AD. Then, in exercising his discretionary power under CIPAA, the LA rejected YTL's application.

[44] The question is, whether the LA had properly considered the reasons given by YTL in its application for further response/rejoinder on the 'new issues' which was allegedly raised in the adjudication reply? To answer the said question, we have to look at the existence of the so called 'new issues' as alleged by YTL.

[45] To recapitulate, the reasons given by YTL to justify further response/rejoinder are as stated at para [37] above. The justifications for the 'new issues' focus on two elements that can be classified as 'new documents' and 'detailed explanations' raised by TSR in the adjudication reply. The two elements are related to the issues of non-submission of the PB, the delay in the progress of the subcontract works related to EOT, the wrongful and unlawful termination of the subcontract works by YTL, and YTL entitlement to LAD as a valid defence and set off to TSR's claim.

[46] Upon perusing the appeal records particularly on the records of the adjudication proceedings, we find that the so called 'new documents' and 'detailed explanations' that had been classified as 'new issues' raised by TSR in the adjudication reply, are not new at all. They were in fact raised by YTL in the adjudication response, and what TSR did was simply raise a reply to the response put by YTL. See para 3, 21 to 52 of the adjudication response at pp 150–152 and 156–176 CCB. As against YTL's allegation, we also observed the fact that YTL had included in its adjudication response more than 1,000 pages of supporting documents which are closely related to TSR's claim or YTL's defence and set off.

[47] We are of the view that the LA had fairly given YTL the opportunity to present his case. We do not consider that, in this light, it may correctly be said that there has been a denial of natural justice, even if the adjudication reply refers to the documents or raise submission not particularly addressed in the adjudication response. We observe that the documents that were said to be 'new documents' were always in the possession of YTL even though it took the view that it was irrelevant for the purpose of determining the scope and extend of TSR's contractual obligations.

[48] So as to the alleged 'new issues', the subject matters of the so-called 'new issues' were in fact readily raised in YTL's adjudication response. YTL had chosen not to address the issues as relevant to its defence and set off even

though they are closely related to TSR's claim. As such, YTL cannot be allowed to put a blame on the LA for its own short coming. We cannot accept that the proposition to refuse further response or additional submission must ipso facto amount to a breach of natural justice. The facts related to the LA's refusal have to be closely examined. On this point, we would like to refer to the decision of the Court of Appeal in Singapore in *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] SGCA 66; [2018] 2 SLR 1311 where it was held that:

> [60] The final type of situation is where the outcome of a dispute is surprising to the parties because they have omitted to address a particular issue even though they could reasonably have foreseen that the issue would form part of the court's decision. *The parties may have chosen not to address the issue because they failed to apply their minds to it, or failed to appreciate its significance, or because they each assumed that the decision-maker would adopt their position on that issue. Whatever the case may be, this type of decision cannot be set aside on the basis of any breach of natural justice because if the parties could reasonably have foreseen that the issue would arise, and if they choose not to address that issue, they cannot complain that they have been deprived of a fair hearing*. (Emphasis added.)

To conclude on the issue of natural justice, whether or not a further response/rejoinder be permitted is purely a matter of a proper exercise of the discretion by the LA. Here, the LA is satisfied that there are sufficient materials before him to deliberate and to decide. Based on our reasons adumbrated above, we find that the exercise of the discretion by the LA is not unreasonable and it does not amount to a breach of natural justice. The LA had acted within his power under the law to make the decision. In fact, as a master of his own procedure, the LA is well entitled to do so under CIPAA.

[49] Next, we moved on to an equally important proposition of law, that is, a setting aside application pursuant to s 15 of the CIPAA is not an appeal. Therefore, the court cannot set aside an adjudication decision even if it is of the view that the adjudicator made an error on a finding of fact or on interpretation of the law. To reenforce the principle of law on this issue, we reproduce an excerpt from the decision of *ACFM Engineering & Construction Sdn Bhd*'s case as follows:

> In the context of s 15 of CIPAA 2012, it cannot be the function of the court to look into or review the merits of the case or to decide the facts of the case. The facts are for the adjudicator to assess and decide on. The court's function is simply to look at the manner in which the adjudicator conducted the hearing and whether he had committed an error of law during that process. Such error of law relates to whether he had accorded procedural fairness to the appellant.

Even if there are valid grounds to set aside the adjudication decision on the merits of the case, the aggrieved party should proceed to re-argue the dispute in court or in arbitration proceedings. Under para s 13(c) of the CIPPA, the adjudication decision is not binding if a dispute is finally disposed of in court

or arbitration. In *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd* [2015] MLJU 941 the High Court had correctly observed that:

> It must be noted that under CIPPA, there is no right of appeal against the decision of the adjudicator which is interim in nature or of temporary finality only. Section 15 has provided limited grounds on which the decision of the adjudicator may be set aside. Since an application under s 15 is not an appeal, the decision of the adjudicator cannot be reviewed on merits. In the instant case, the applicant has relied on the ground of breach of natural justice and excess of jurisdiction to set aside the decision of the adjudicator. In the premises, the criticism of the adjudication decision by the applicant must clearly point to a breach of natural justice or a jurisdictional error in the adjudication process. Otherwise, the instant proceeding would be converted to a full-blown appeal or a rehearing of the adjudication process.

[50] In relation to TSR's appeal before us, we are of the view that the LA had diligently considered all the submissions submitted and the documents tendered by the parties when he decided to refuse YTL's application for further response/rejoinder. In fact, the LA had clearly emphasised that all the submissions are clear to him and satisfactory for him to make the AD as stated at para 2(b) in the LA's letter. Even when we perused the reasoning given by the LA in the AD, which can be found at pp 105 to 130 CCB, we are contented that the LA did consider all the issues raised in relation to TSR's claim and YTL's defence and set off, inclusive of all documents tendered by the parties. The LA did make reference to the issues raised by the parties and clearly set out his reasoning in respect of those issues. Thus, as the LA had considered and made a decision largely on factual grounds, it was not for the LHCJ to decide whether the LA had reached the correct conclusion on the facts or law as founded by him. In other words, whether or not the LA made a correct decision, is purely the question of merits of the AD and not amenable to be challenged in the court under the CIPAA.

[51] In accepting YTL's application to set aside the AD via OS 8, it is evident that the LHCJ meddled with the merit of the LA's AD. The LHCJ reasoning, specifically at paras [48] to [60] of her GOJ, clearly shows that Her Ladyship had discussed, deliberated and made findings on the merits of TSR's claim, and YTL defence and set off as if the matters were before her to decide. It seems to us that the LHCJ is hearing an appeal against the LA's AD rather than setting aside an application under s 15 of the CIPAA. The correct approach is, even if the result may have been different if the dispute is referred before her at first instant, the LHCJ should not disturb the LA's AD which was based upon factual and legal conclusions which he is entitled to do so under the law. In a recent decision in the case of *J&B Hopkins Ltd v A&V Building Solution Ltd* [2023] EWHC 301 (TCC) (*J&B Hopkins Ltd*'s case), Mr Roger Ter Haar KC made a following comment at para 59:

> It may well be that if this dispute is referred to a court or arbitrator that a different result may prevail. However, applying the authorities which I have referred to above, it seems to me that the adjudicator has made a decision based upon factual and legal conclusions at which he is entitle to arrive, and there has been no breach of natural justice of the type which would entitle me to set aside or refuse to enforce the decision.

Based on the said proposition of law, we are of the considered view that the LHCJ had acted beyond her boundary when she decided to disturb the LA's AD on the findings of fact and law. Even if it can be said that the LHCJ would have arrived at a different decision than the LA, this by itself is not a basis for setting aside of the AD on the ground of breach of natural justice.

[52] Moving on to our final consideration, we agree with TSR's contention that there is an overarching duty on the LA to render the AD within a limited time frame. To all intents and purposes of the legislators, sub-s 12(2) of the CIPAA mandated that an adjudication decision has to be delivered within 45 days from the service of the adjudication reply. Failing which, the adjudication decision is void. The rationale behind the prescription of the time frame for the adjudicator to decide is comprehensible. Mary Lim J (now FCJ) in *Subang Skypark Sdn Bhd v Arcradius Sdn Bhd* [2015] 11 MLJ 818; [2015] 10 CLJ 801, had opined that:

> [56] It is my view that the overarching concern at this point must be the purpose or object of the CIPAA. Just as it was regarded in the English, Australian and Singapore equivalent contexts, the Malaysian context of the CIPAA is no different. The purpose of the Act is to ensure that successful claimants are paid and paid promptly even though the adjudication decisions are provisional in nature. The defendant must pay the adjudicated sum failing which it is available to the successful claimant to consider the next appropriate course of action. Notwithstanding these provisions, the court retains the power to grant stay of the enforcement of the adjudication decision. It does so in order to secure the ends of justice.

Later, in *Foster Wheeler E & C (Malaysia) Sdn Bhd v Arkema Thiochemicals Sdn Bhd and another case* [2015] MLJU 1952; [2015] CLJU 632 Her Ladyship made the following observation:

> [45] But, in the context of a payment dispute or payment claim, the considerations are different. The rationale and ethos of the CIPAA 2012 are as expressed in *Uda Holdings* and *Subang Skypark Sdn Bhd* that it is the speedy resolution of payment disputes that is the key. The resolution will allow either cashflow back into the progress of the works; or that parties can get on with their progress of works.
>
> ...
>
> [48] It is often said that Parliament in its wisdom has seen it fit to enact the CIPAA 2012 in its present form. In recognising that adjudication only offers temporary finality to the resolution of the payment dispute and that the subject matter of the adjudication decision can still be finally determined in arbitration or the court, Parliament has implicitly and firmly endorsed the principle of 'pay now talk later'.

A In other words, the parties pay now against the adjudication decision; and talk later at the arbitration to finally resolve the issue.

Finally, we refer to the observation made by Mr Roger Ter Haar KC in *J&B Hopkins Ltd*'s case. His observation at paras 75 and 76 are as follows:

B 75. Delving into what was put before the adjudicator reveals that, not unusually, he was faced with a mass of material not always accompanied by a clear route map as how best to proceed.

76. He appears to me to have entered into that process, in the limited timescale afforded to adjudicators, diligently and thoughtfully. If there are, as I have C suggested, some areas where, with the benefit of hindsight, things might have been done differently, there is nothing in the matters raised before me which crosses the threshold so as to establish a breach of natural justice which would justify me in refusing to enforce the decision.

D **[53]** Constrained by the time frame, we agree that the LA should be given some leeway in deciding his route maps, including his discretion to finalise his own procedure for handling the dispute before him. The LA's act of refusing YTL's application for further response/rejoinder after giving his reason for doing so to YTL is well within the discretion of the LA. We would emphasise E that it should not be a basis for setting aside the AD on the ground of a breach of natural justice.

[54] On the final note, we are mindful of the general scope and objective as F stipulated in the long title of the CIPPA as follows:

An Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.

G For better understanding of the objective and the perspective of the statutory adjudication scheme under the construction industry payment law like CIPAA, we make reference to a useful reminder delivered by Chadwick LJ in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ H 1358 as follows:

[85] *The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision* unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. *It should be only in rare circumstances* I *that the courts will interfere with the decision of an adjudicator*. The courts should give no encouragement to the approach adopted by DML in the present case; which is contrary to DML's outline submissions, to which we have referred in para 66 of this judgment) may, indeed, aptly be described as 'simply scrabbling around to find some argument, however tenuous, to resist payment'.

> [86] It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels 'excess of jurisdiction' or 'breach of natural justice'. *It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case*. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or subcontractor) or his subcontractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash flow requirements of contractors and their subcontractors. *The need to have the 'right' answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions*. Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme; or whether such disputes are suitable for adjudication under the scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in a case like the present.
>
> [87] In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. *To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense — as, we suspect, the costs incurred in the present case will demonstrate only too clearly*. (Emphasis added.)

[55] We observe that the past decided cases across many jurisdictions demonstrate that a high threshold is required to be met to successfully argue that an adjudicator breached the rules of natural justice. The same approach was taken by the courts in our jurisdiction. The rationale behind the said approach is understandable based on the reasoning in the dicta of Chadwick LJ above. In the present appeal, YTL's allegations that TSR raised 'new issues' in its application for further response/rejoinder failed to cross the high threshold as it is clear that the so called 'new issues' are not new since they are within the knowledge of the parties.

CONCLUSION

[56] For the reasons given, we find that the LHCJ had erred in allowing YTL's setting aside application in OS 8 and in dismissing TSR's application to enforce the AD in OS 249. We set aside both of the LHCJ decisions.

[57] We therefore allowed appeals by TSR in Appeal 1353 and Appeal 1352 with costs of RM30,000 here and below for both appeals, and subject to allocator.

Both appeals allowed and High Court's decisions set aside.

Reported by Ashok Kumar